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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HERMAN ARCHILA, Defendant and Appellant.	B292052 (Los Angeles County Super. Ct. No. LA077105)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Chung L. Mar, and David Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Herman Archila of one count of first degree murder (Pen. Code, § 187, subd. (a))[1] and one count of misdemeanor child abuse (§ 273a, subd. (b).) The jury also found true an allegation that defendant personally used a deadly or dangerous weapon (a knife) in the commission of the murder. (§ 12022, subd. (b)(1).) The trial court sentenced him to a total of 26 years to life in prison. The court also imposed certain fines and assessments.

Defendant contends: (1) Statements made by the victim to a police officer and a neighbor were introduced in violation of the Sixth Amendment's confrontation clause; (2) Certain jury instructions were prejudicially erroneous; (3) Testimony of defendant's prior acts of domestic violence against the victim were erroneously admitted; (4) The prosecutor committed misconduct during closing arguments; (5) The court imposed certain assessments and a restitution fine without determining defendant's ability to pay; (6) If defendant has forfeited any argument by failing to raise it below, his counsel was constitutionally deficient; and (7) A clerical error in the abstract of judgment must be corrected. We agree with the last point and reject his other contentions.

FACTUAL SUMMARY AND PROCEDURAL HISTORY

A. *The Killing of Rosbita Varsena*

In February 2014, defendant and Rosbita Varsena lived together in an apartment in North Hollywood with their one-year-old son, J. They shared the apartment with defendant's

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

brother, Feliciano, and Feliciano's partner, Arminda Jimenez.[2] Defendant, Varsena, and J. shared one bedroom in the apartment, and Feliciano and Jimenez another.

In the evening of February 28, 2014, defendant, Varsena, Feliciano, and Jimenez drank beer and ate dinner. At about 9:00 p.m., Varsena put J. to bed in his crib. Around 10:00 p.m., Feliciano and Jimenez retired to their bedroom while defendant and Varsena stayed up.

Several hours later—at about 1:00 a.m. on March 1, 2014—a resident in the apartment directly below defendant's apartment heard footsteps and running water, as if from a shower, coming from the defendant's apartment.

Video surveillance cameras in the area showed defendant walking away from his apartment building shortly after 2:00 a.m. Around that time, he called his son, Pascual, and said he was on his way to Pascual's home. Pascual told defendant that he could not come to his home, but agreed to pick him up at a convenience store and drive him to the home of defendant's other son, Amadeo, in San Bernardino.

Defendant called Amadeo and told him he was on his way to see him. Defendant said he had had problems with Varsena and would explain when he arrived.

After defendant arrived at Amadeo's house, defendant told Amadeo that he had stabbed Varsena and hurt her, but was not "sure about everything that had gone on." Amadeo could tell that defendant was drunk and "wasn't with it at the time." Defendant

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[2] The defendant and three witnesses in the case—Feliciano Archila, Pascual Archila, and Amadeo Archila—share the same surname. To avoid confusion, we will refer to these witnesses by their first names.

told Amadeo that he and Varsena had been having trouble for two or three days, and that Varsena would not allow defendant to touch her. Defendant also told Amadeo that Varsena had "confessed" to meeting "someone who had money and cars and . . . could give her what she needed."

Amadeo called Feliciano, who was still asleep. Amadeo told Feliciano to go look in defendant's room because defendant "had fucked up" Varsena. Feliciano then told Jimenez to check on defendant and Varsena. Jimenez went into defendant and Varsena's bedroom and found Varsena on the floor, covered in a blanket, in "a pool of blood." Jimenez yelled, "[S]he's dead." Feliciano went into the room, saw Varsena's body, then picked up J., who was standing in the crib. J. was not crying and, according to Feliciano, did not have any blood on him.[3] Feliciano handed J. to Jimenez, and then called the police.

The police found a pair of blood-stained pajama pants in the bedroom and a blood-stained, serrated knife, approximately 12 to 15 inches long, inside a closed dresser drawer. There were blue fibers on the knife that matched the fibers on a blue blanket found on Varsena's legs. DNA in the blood found on the knife and the pajamas matched Varsena's DNA. Blood was found on the bedroom walls and in the bathroom and kitchen sinks, and there was water in the base of the shower.

Varsena died as a result of a stab wound to her chest. According to a medical examiner, the knife found in the dresser drawer could have caused the wound.

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[3] A responding paramedic observed that J. had blood on his hand, arms, and legs, but no apparent injuries.

B. *Evidence of Prior Incidents*

Over defense objections, the prosecution introduced evidence of three prior incidents involving defendant's acts of violence against Varsena. One occurred in the middle of a night in June 2013. Varsena's cousin, Sergio Toledo, testified that Varsena had called him; she was crying and said that defendant hit her. Varsena asked Toledo to come get her and to let her stay with him at his home in Lake Elsinore. Toledo then spoke with Jimenez, who was with Varsena. Jimenez told Toledo that defendant and Varsena had fought, and that Varsena was okay. Jimenez asked Toledo to take Varsena, if he could. Toledo's wife drove to Varsena's apartment to pick her up, but when she arrived, Varsena told her that she had decided not to leave.

A second incident occurred on September 28, 2013—about five months before Varsena's death. Four police officers responded to a report of domestic violence at defendant and Varsena's apartment. Varsena was crying. One of the responding officers, Ramiro Munoz, testified that he observed Varsena's hair on the floor of the kitchen and in Varsena's hands, and hair missing from Varsena's head. Varsena told Officer Munoz that she was fine and not afraid. She said that she, defendant, Jimenez, and Feliciano had been playing cards. Defendant told Varsena to end the game and go to bed, but Varsena did not want to do so. Varsena said she became verbally abusive toward defendant, and defendant responded by grabbing her hair and dragging her through the kitchen, causing her to hit walls and furniture.

The officers placed defendant in handcuffs within the apartment. According to Officer Munoz, defendant stated (before the officers had asked him any questions): " 'I brought her here from Mexico. I should be able to do what I want. I brought her two years ago. I pay the rent. I'm the boss.' " He also said that Varsena " 'disrespected [him] in front of [his] friends,' " that he

could "do whatever he wants with her," and she "deserved to get hit."

Esther Santos, who lived in the same building as Varsena, testified about a third incident.[4] On that occasion, Varsena appeared at her door at 3:00 a.m. and asked to be let inside. Varsena was limping and shaking, and had bruises around her left eye and on the left side of her face. Varsena told Santos that defendant had beat her and that she was afraid of him. While Santos was sitting with Varsena, defendant called Santos and told her that he would kill Santos and her son if she called the police. Santos advised Varsena to leave defendant and find a safe place, but Varsena told her that defendant said he would kill her if she ran away.

DISCUSSION

I. Varsena's Statements to Officer Munoz

Defendant argued below that the evidence of Varsena's statements to Officer Munoz in connection with the September 28, 2013 incident were testimonial statements for purposes of the Sixth Amendment's confrontation clause and therefore inadmissible. The court rejected the argument and allowed Officer Munoz to testify as to the statements. Defendant contends that the ruling was error. In reviewing the ruling, we defer to the trial court's determinations of historical facts, determine the law independently, and apply the law to those facts de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)

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[4] Santos's testimony and prior statements to police as to when this incident took place were inconsistent, and it is not clear whether the incident occurred before or after the September 28, 2013 incident.

If error is shown, we will not reverse the conviction if the error is harmless beyond a reasonable doubt. (*People v. Cage* (2007) 40 Cal.4th 965, 991.)

Under the confrontation clause, criminal defendants have the right to be confronted with the witnesses against them. (U.S. Const., 6th Amend.) Witnesses, for purposes of the confrontation clause, are those who " 'bear testimony.' " (*Crawford v. Washington* (2004) 541 U.S. 36, 51 (*Crawford*).) In *Crawford*, the court stated that testimony includes "[s]tatements taken by police officers in the course of interrogations," but declined to provide a more "precise articulation" of the term. (*Id.* at p. 52.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Supreme Court was "require[d] . . . to determine more precisely which police interrogations produce testimony" for purposes of the confrontation clause. (*Id.* at p. 822.) The court attempted such precision in stating that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.)[5]

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[5] Although this formulation of testimonial does not explicitly mention the formality of the statement as a factor in evaluating its testimonial nature, the *Davis* court stated in a footnote that "formality is indeed essential to testimonial utterance." (*Davis*, *supra*, 547 U.S. at pp. 830–831, fn. 5.) The Supreme Court subsequently stated that "[a]nother factor . . . is the importance of *informality* in an encounter between a victim and police." (*Michigan v. Bryant* (2011) 562 U.S. 344, 366.) Our state Supreme

Davis considered two cases involving responses to reports of domestic violence. In one, the victim made the challenged statements during a 911 call to report her former boyfriend's physical assault against her and his departure from the scene as it happened. (*Davis*, *supra*, 547 U.S. at pp. 817, 827.) A recording of the 911 call was admitted into evidence against the former boyfriend. The Supreme Court held that the statements were not testimonial because: The victim spoke "about events *as they were actually happening,* rather than "describ[ing] past events' "; the circumstances objectively indicated an ongoing emergency; the statements were made to resolve the emergency; and the victim spoke frantically over the telephone, under circumstances that lacked the solemnity of a relatively tranquil police station interview. (*Davis*, *supra*, 547 U.S. at p. 827.) These circumstances, the court concluded, "objectively indicate [that the conversation's] primary purpose was to enable police assistance to meet an ongoing emergency. [The victim] simply was not acting as a *witness*; she was not *testifying*." (*Id.* at p. 828.) The introduction of the statements, therefore, did not violate the confrontation clause.

The *Davis* court came to a different conclusion in the companion case. In that case, police responded to a report of domestic violence and found the victim, somewhat frightened, on her front porch. (*Davis*, *supra*, 547 U.S. at p. 819.) She told the officers that " ' "nothing was the matter," ' " and gave them permission to go inside. (*Ibid.*) The defendant was inside the house and explained that the two " 'had "been in an argument"

Court has identified a "degree of formality or solemnity" as one of two "critical components" of a testimonial statement. (*People v. Lopez* (2012) 55 Cal.4th 569, 581.) The second is that the statement's "primary purpose" must pertain "in some fashion to a criminal prosecution." (*Id.* at p. 582.)

but "everything was fine now" and the argument "never became physical." ' " (*Ibid.*) One officer remained with the defendant while a second questioned the victim about " 'what had occurred.' " (*Ibid.*) The defendant attempted to participate in the conversation between the officer and the victim, but was "rebuffed" by an officer who told the defendant that he needed to be separated from the victim " 'so that [they] can investigate what had happened.' " (*Id.* at p. 820.) After hearing from the victim, "the officer 'had her fill out and sign a battery affidavit.' " (*Ibid.*) Under these circumstances, the Supreme Court held that the victim's statements were testimonial because "[w]hen the officer questioned [the victim] for the second time, and elicited the challenged statements, he was not seeking to determine (as in [the companion case]) 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done." (*Id.* at p. 830.) Although the officer's interview of the victim did not have the formality of a police station interview, "[i]t was formal enough that [the victim's] interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].' " (*Ibid.*)

Here, the trial court rejected defendant's confrontation clause argument, stating that under *Davis*, *supra*, 547 U.S. 813, " 'a statement is not considered testimonial when it's a police officer arriving to an emergency situation, especially involving domestic violence,' as it was in *Davis* and the case at bar and the police officer's sorting out what had happened, who was responsible, and . . . whether there was self-defense, whether there was someone injured, whether someone was assaulted . . . and what those circumstances were so that the police officer can make a decision on what to do. Those statements are not testimonial.

They weren't statements taken for the sole purpose of being used in later testimony in an action to be filed. They [Officer Munoz and other officers] were the first officer[s] arriving at a crime scene under emergency conditions, sorting out what had happened."

We need not decide whether the court erred in allowing Officer Munoz to testify as to Varsena's statements because any error was harmless beyond a reasonable doubt. The evidence of defendant's guilt was strong and uncontradicted: Varsena died in the bedroom she shared with defendant from a single stab wound; the murder weapon was a knife found in a dresser drawer in the bedroom; defendant fled the apartment and went to the home of a son to whom he admitted stabbing Varsena. The challenged statements pertained only to details of one of three prior incidents of domestic violence by defendant against Varsena. Even if Varsena's statements had been excluded, Officer Munoz's other testimony regarding the incident was admissible, including his testimony about the hair he had seen on the floor and in Varsena's hand, and the hairless spots on Varsena's scalp, as well as the evidence of defendant's statements at the time that he could "do whatever he wants with her," and she "deserved to get hit." The evidence of defendant's violence against Varsena during that incident was also corroborated by Jimenez's testimony that defendant had hit Varsena and "ripped out" some of Varsena's hair during the incident and photographs showing hair on the apartment floor. In light of the overwhelming evidence of defendant's guilt and the relative insignificance of the challenged statements, we are convinced beyond a reasonable doubt that error, if any, in allowing Munoz's testimony regarding Varsena's statements was harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

Defendant argues, however, that the evidence of Varsena's statements to Officer Munoz may have influenced the jury's

finding of premeditation and deliberation. We disagree. Varsena's statements regarding the manner in which defendant pulled her hair and dragged her through her kitchen in September 2013 had little, if any, bearing upon the question whether he acted with premeditation and deliberation when he killed Varsena five months later. Far more telling was the manner of the killing itself—a stab to the chest with a foot-long knife—and other evidence of defendant's prior acts of violence and threats against Varsena, including Varsena's statement to Santos that defendant had said that he would kill Varsena if she ran away from him. Therefore, Varsena's statements to Officer Munoz, if inadmissible, were harmless even as to the issue of premeditation and deliberation.

II. Varsena's Statements to Santos

Defendant contends that the evidence of Varsena's statements to her neighbor Santos about the incident that led Varsena to seek sanctuary in Santos's apartment were testimonial and therefore admitted in violation of the confrontation clause. He argues that the statements were testimonial under a test derived from a dissenting opinion in a Washington state case: *State v. Shafer* (2006) 156 Wash.2d 381, 399 [128 P.3d 87, 94] (dis. opn. of Sanders, J.). Based on that dissent, defendant asserts that "the test should be whether it is reasonably foreseeable under the circumstances that the statement could be used in the future prosecution of a crime." Under this test, statements to friends or others having no connection with law enforcement or any police investigation may nevertheless be deemed testimonial. Defendant acknowledges that this is not the test used by the California courts. (See, e.g., *People v. Gutierrez* (2009) 45 Cal.4th 789, 813 [casual remark to acquaintance is not testimonial]; *People v. Brooks* (2017) 3 Cal.5th 1, 39 [statements to friend "were clearly nontestimonial"]; *People v. Blacksher* (2011) 52 Cal.4th 769, 818 [statements to

friend "not made in response to police interrogation or to any police agent" were not testimonial].) We must, of course, follow the law established by our Supreme Court, and therefore reject defendant's argument.

Defendant further contends that the statements should have been excluded as violative of due process. Quoting Justice Harlan's concurring opinion in *California v. Green* (1970) 399 U.S. 149, defendant argues that "[d]ue process does not permit a conviction based . . . on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court." (*Id.* at pp. 187-187, fn. 20 (conc. opn. of Harlan, J.).) The reliability of Santos's testimony, he asserts, was "questionable given [her] friendship with [Varsena] and her noticeable bias against Archila." Being a friend of the victim and exhibiting hostility toward the friend's abuser does not, without more, suggest anything comparable to the kangaroo court of which Justice Harlan warned. Defendant has not established that allowing Santos's testimony violated his right to due process.

III. Voluntary Manslaughter Instructions

Defendant contends that the court's use of CALCRIM No. 522 and CALCRIM No. 570 created a burden shifting presumption in favor of murder. We disagree.

CALCRIM No. 522, as given in this case, provides: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

CALCRIM No. 570, as given, begins: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." The instruction then addresses the law regarding heat of passion, and concludes: "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

Defendant contends that these instructions, though they "may correctly state the law," "effectively lightened the prosecution's burden of proof by creating an impermissible inference in favor of the prosecution on the pivotal issue of whether [defendant's] mental state satisfied the requirements for murder and premeditated first degree murder." According to defendant, the instructions "included language that explicitly states that homicide is murder unless the defense convinces the jury it should be 'reduced' to voluntary manslaughter." The instructions, however, do not include any such language, explicitly or implicitly. Moreover, defendant's interpretation is precluded by the concluding sentence of CALCRIM No. 570 that the prosecution has "the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion."[6]

Defendant argues that the instruction is comparable to a jury instruction that the United States Supreme Court held violated due process in *Mullaney v. Wilbur* (1975) 421 U.S. 684. The offending instruction in *Mullaney* stated that "malice

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[6] The court also instructed the jury with CALCRIM No. 220, which states that the prosecution must prove the defendant's guilt beyond a reasonable doubt.

aforethought was to be conclusively implied *unless the defendant proved* by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." (*Id.* at p. 686, italics added.) The instruction violated due process, the court explained, because it "affirmatively shifted the burden of proof to the defendant." (*Id.* at p. 701.) The challenged instructions in the instant case are not comparable to the instruction in *Mullaney*, and do not similarly shift the burden of proof to the defendant. *Mullaney*, therefore, does not support defendant's argument.

Defendant further argues that the instructions had the effect of mandating a particular order of jury deliberations when considering greater and lesser offenses, which our Supreme Court disapproved in *People v. Kurtzman* (1988) 46 Cal.3d 322, 326–335. Nothing in the challenged instructions, however, precluded the jurors from considering lesser offenses while they determined guilt or acquittal of the charged, greater offense. We therefore reject the argument.

IV. Evidence of Uncharged Offenses

As summarized above, the prosecution introduced evidence of three prior incidents of domestic violence that defendant committed against Varsena. The court admitted the evidence under Evidence Code section 1109, which provides generally: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

Defendant contends that the admission of such evidence violated his right to due process because it allowed the jury to consider it as evidence of his criminal propensity. He acknowledges that our Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903

(*Falsetta*) has rejected an analogous argument concerning a parallel provision in Evidence Code section 1108.[7] The *Falsetta* Court explained that Evidence Code section 1108, which permits evidence of uncharged sexual offenses to be admitted against a defendant accused of a sexual offense, did not violate due process because of that statute's requirement that the evidence was subject to exclusion under Evidence Code section 352. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.)

As defendant concedes, although *Falsetta* did not address Evidence Code section 1109, Courts of Appeal have consistently held that *Falsetta*'s rationale compels the conclusion that Evidence Code section 1109 does not violate due process. (See, e.g., *People v. Johnson* (2010) 185 Cal.App.4th 520, 529; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026–1028; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1311; *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703–704; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1332–1333.) Defendant argues that we should not follow these decisions and that *Falsetta* should be reconsidered in light of a Ninth Circuit Court of Appeals' decision in *Garceau v. Woodford* (9th Cir. 2001) 275, F.3d 769, reversed on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202. Any reconsideration of *Falsetta*, however, must be made by our Supreme Court, not this court. We agree with the cited Court

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[7] Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

of Appeal decisions that *Falsetta*'s rationale applies to Evidence Code section 1109, and therefore reject defendant's due process argument.

Defendant also argues that Evidence Code section 1109 violates the Fourteenth Amendment's equal protection clause. He contends that we should apply a strict scrutiny standard to the statute because it violates due process, and that the statute cannot survive that standard. We have, however, rejected his due process premise based upon *Falsetta* and the authorities cited above. Moreover, as defendant acknowledges, his argument has been rejected by each Court of Appeal that has addressed the question. (See, e.g., *People v. Jennings*, *supra*, 81 Cal.App.4th at pp. 1310–1313; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, fn. 14.) We agree with these decisions, and therefore reject defendant's equal protection argument.

V. CALCRIM No. 852A

Defendant contends that the court erred in instructing the jury with CALCRIM No. 852A regarding uncharged acts of domestic violence.[8] Defendant argues that the instruction

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[8] As given in this case, CALCRIM No. 852A provides: "The people presented evidence that the defendant committed domestic violence that was not charged in this case. [¶] Domestic violence means abuse committed against an adult who is a cohabitant. Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. [¶] The term cohabitants means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but not

"interferes with the presumption of innocence, [and] makes conviction possible without proof beyond a reasonable doubt." He concedes that our Supreme Court has rejected his argument in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016, and that we are bound to follow *Reliford*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) We agree, and therefore reject the argument.[9]

VI. Flight Instruction

Based on the facts that defendant left the scene of the crime at about 2:00 a.m. and went eventually to his son's home in San Bernardino, the court instructed the jury with CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Defendant contends that the instruction impermissibly allowed the jury to make an irrational permissive inference from his flight from his apartment. We reject the contention.

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limited to (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the parties registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt."

[9] Defendant explains that he is asserting the argument "for purposes of preserving the issue for federal review."

Defendant acknowledges that our Supreme Court has previously approved of other flight instructions based on the rationale that jurors were permitted to infer a "consciousness of guilt" from the defendant's flight. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) He contends, however, that these cases are not controlling because the instruction in this case used the phrase "aware of his guilt," not "consciousness of guilt." An "instruction suggesting that the defendant is 'aware of his guilt,' " he argues, "is not equivalent to a more vague, impersonal suggestion of 'a consciousness of guilt.' " Other Courts of Appeal have considered this argument and rejected it. (See, e.g., *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, 1159 (*Hernández Ríos*); *People v. Price* (2017) 8 Cal.App.5th 409, 454–456; see also *People v. Paysinger* (2009) 174 Cal.App.4th 26, 29–32 [rejecting various arguments that CALCRIM No. 372 is unconstitutional].) In *Hernández Ríos,* the court conducted a "etymological analysis" of "consciousness" and "awareness" and determined that the two words were effectively synonymous. (*Hernández Ríos*, *supra*, 151 Cal.App.4th at pp. 1158-1159.) And because the Supreme Court has held that an instruction that permits a consciousness-of-guilt inference "passes constitutional muster," so does the awareness-of-guilt inference that is permitted under CALCRIM No. 372. (*Hernández Ríos*, *supra*, at p. 1159.) We agree with the foregoing authorities and reject defendant's argument.

VII. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct during closing argument by stating the following:

"A cold, calculated decision to kill like that in this case, where the defendant took this knife and shoved it four inches

deep into [Varsena's] body in her heart while his son was feet away, that decision was cold and calculated, and it didn't need to take a lot of time to reach it. The test is the extent of the reflection, not the length of time. A good example of that is simple. In fact, we saw the defendant himself on video make this deliberate and premeditated decision about crossing the street right after he murdered [Varsena]. We make these decisions every single day. This is what deliberation and premeditation means. When we see a stop sign or a red light, we look to the left, we look to the right, we decide if it's safe to enter, and then we go forward. That, ladies and gentlemen, is deliberation and premeditation. That is a split-second decision. It involved deliberation. We determined whether or not it was safe to enter the street. It involved premeditation. We weighed it beforehand. That is what deliberation and premeditation mean, and the defendant did so in this case."

Defense counsel did not object to the statements.

On appeal, defendant argues that the prosecutor's description of the decision-making process for entering an intersection as an example of deliberation and premeditation, "minimized the seriousness of the matter under consideration" and "trivialized the prosecution's burden to establish the most culpable of mental states." This "mischaracterization of the law," he continues, "constituted serious misconduct" and deprived him of his right to a fair trial.

As the Attorney General argues, defendant forfeited this issue by failing to object to the prosecutor's statements in the trial court. (See *People v. Williams* (1997) 16 Cal.4th 153, 254.)

We also reject defendant's follow-up argument that the failure to object deprived him of his right to effective assistance of counsel: Even if we assume that the trial court might have sustained such an objection if counsel raised it, counsel may have

reasonably decided not to assert the objection for the rational tactical reason that the court might have overruled the objection and thereby drawn additional attention and legitimacy to the prosecutor's point. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 715 (*Avila*) [prosecutor did not commit misconduct by comparing the " ' "cold calculated" judgment of murder' " to the decision whether to stop at a yellow light or proceed through the intersection]; *People v. Harris* (2008) 43 Cal.4th 1269, 1290 [counsel may have made a rational tactical decision not to object to prosecutor's argument in order to avoid focusing jurors' attention on the matter].) When, as here, the record on appeal sheds no light on why counsel failed to object and there could be a satisfactory explanation for the failure, the claim of ineffectiveness of counsel must be rejected. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) In any case, the prosecutor's statements were not prejudicial; overwhelming evidence supports defendant's conviction.

VIII. Assessments and Restitution Fine, and Defendant's Ability to Pay

When sentencing defendant in June 2018, the trial court imposed two assessments that are statutorily mandated: a $40 court operations assessment per count (§ 1465.8, subd. (a)), and a $30 court facilities assessment per count (Gov. Code, § 70373). The court also imposed a $5,000 restitution fine pursuant to section 1202.4, subdivision (b). Defendant did not object to the assessments or the fine, and did not request that the court consider his ability to pay them.

Defendant argues that the assessments should be reversed and the restitution fine stayed unless and until the government proves he has the ability to pay that fine. He relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which was decided in January 2019, while this appeal was pending.

In *Dueñas*, the trial court imposed on the defendant certain assessments and a $150 restitution fine—the minimum amount required under section 1202.4, subdivision (b). The court rejected the defendant's argument that the imposition of the assessments and the fine without consideration of her ability to pay them violated her constitutional rights to due process and equal protection. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) The Court of Appeal reversed, holding that "the assessment provisions of Government Code section 70373 and . . . section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair[, and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas*, *supra*, Cal.App.5th at p. 1168.) The imposition of a minimum restitution fine without consideration of the defendant's ability to pay also violated due process. (*Id*. at pp. 1169–1172.) The court reversed the order imposing the assessments and directed the trial court to stay the execution of the restitution fine "unless and until the People prove that [the defendant] has the present ability to pay it." (*Id*. at pp. 1172-1173.)

Here, the Attorney General contends that the defendant forfeited any challenge to the assessments and fine by failing to object or raise the issue below. This general rule is well-settled. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *Avila*, *supra*, 46 Cal.4th at p. 729.) Defendant argues, however, that the forfeiture rule should not apply because his sentencing occurred prior to *Dueñas*, and any objection would therefore have been futile. Courts have addressed similar arguments with different results. In *People v. Castellano* (2019) 33 Cal.App.5th 485, Division Seven of this court held that the forfeiture rule did not apply to a defendant sentenced prior to *Dueñas* because no court had previously "held it

was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay." (*Id.* at p. 489; accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 138.) In *People v. Frandsen* (2019) 33 Cal.App.5th 1126, Division Eight of this court applied the forfeiture rule and disagreed with the defendant's assertion that *Dueñas* constituted " 'a dramatic and unforeseen change in the law.' " (*Id.* at p. 1154; accord, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.)

More recently, the Fourth District, Division One, addressed the forfeiture argument in *People v. Gutierrez* (2019) 35 Cal.App.5th 1027 (*Gutierrez*). In that case, the trial court imposed a restitution fine in the amount of $10,000 and certain fees and assessments totaling $1,300. The court held that the defendant, who had been sentenced prior to *Dueñas*, had forfeited his right to raise an inability-to-pay argument on appeal by failing to raise the argument below. (*Id.* at p. 1029.)

The majority in *Gutierrez* expressly declined to express its views on the correctness of *Dueñas* (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1032, fn. 11), and avoided the "perceived disagreement" between *Castellano* and *Frandsen* about the foreseeability of *Dueñas*, by finding forfeiture on another ground. (*Id.* at p. 1032.) The court explained that the trial court had imposed a restitution fine greater than the statutory minimum; indeed, it had imposed the maximum amount permitted by statute. (*Id.* at pp. 1032–1033.)[10] Because "even before *Dueñas*"

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[10] Justice Benke concurred in *Gutierrez* and wrote separately "to express [her] disagreement with *Dueñas*." (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1034 (conc. opn. of Benke, J.).) *Dueñas*, Justice Benke stated, was fundamentally flawed in its analysis of constitutional principles and incorrectly applied California statutes. (*Id.* at pp. 1038–1039.)

section 1202.4 permitted the court to consider a defendant's ability to pay when it imposed a fine above the statutory minimum, "a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay." (*Id.* at p. 1033; see also *Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [prior to *Duenas*, an objection to a fine above the statutory minimum would not have been futile]; *Avila, supra,* 46 Cal.4th at p. 729 [defendant forfeited challenge to restitution fine greater than the minimum by failing to raise the argument below].) "Thus," the *Gutierrez* court explained, "even if *Dueñas* was unforeseeable . . . , under the facts of this case [the defendant] forfeited any ability-to-pay argument regarding the restitution fine by failing to object." (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033.) Regarding the lesser sum imposed for other fees and assessments, the court stated that the defendant's challenge to these amounts was also forfeited because, as "a practical matter, if [the defendant] chose not to object to a $10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional $1,300 in fees." (*Ibid.*)

The *Gutierrez* court's forfeiture rationale applies here. Because the court imposed a $5,000 restitution fine—an amount far greater than the $300 statutory minimum—defendant had the right, even before *Dueñas*, to request that the court consider his inability to pay that amount and "had every incentive" to do so. (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033.) Because he failed to raise his inability to pay the $5,000 fine, defendant, like the defendant in *Gutierrez,* "surely would not complain on similar grounds" as to the relatively insignificant $80 and $60 assessments. (*Ibid.*; see also *Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [because the defendant failed to object to $10,000 restitution fine based on inability to pay, he failed on appeal to show "a basis to vacate assessments totaling $120 for inability to pay"].) We therefore

conclude that defendant has forfeited his arguments challenging these assessments and restitution fine.[11]

Defendant's further argument that his counsel was ineffective for failing to preserve the inability-to-pay issue on appeal is without merit because we cannot determine from our record why counsel failed to request a hearing on his ability-to-pay; it is possible that defendant did have the ability to pay the fine and assessments and, therefore, counsel made a rational decision not to raise the issue. Moreover, in the absence of a record from which we could determine that defendant did not have the ability to pay, defendant has failed to establish a reasonable probability that, if counsel had raised the issue below, he would have obtained relief. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694.) We therefore reject his ineffective assistance claim.

IX. Clerical Error in Abstract of Judgment

Defendant contends that the abstract of judgment incorrectly states the amount of the court facilities assessment to be $90 instead of the $60 ($30 for each of two counts) the court had imposed. The court's oral pronouncement was correct (Gov. Code, § 70373, subd. (a)(1)), and the $90 amount stated in the abstract of judgment is a clerical error. We will direct the court to amend the abstract accordingly. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471; *In re Candelario* (1970) 3 Cal.3d 702, 705.)

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[11] Because we conclude that defendant has forfeited the inability to pay argument, we express no view on whether *Dueñas* was correctly decided.

DISPOSITION

The judgment is affirmed. The court is directed to amend the defendant's abstract of judgment to state that the court facilities assessment imposed pursuant to Government Code section 70373, subdivision (a)(1) is $60 and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.